

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LELAND THORNE</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>CHEMTRADE LOGSITICS, INC.</b>	)	
Respondent	)	Docket No. 1,046,917
	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier (respondent) request review of the September 28, 2009 Order for Compensation entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

The Administrative Law Judge (ALJ) found that the claimant suffered an accidental injury arising out of and in the course of his employment with respondent and awarded temporary total disability benefits and ongoing medical treatment with Dr. Stull.

The respondent requests review of this decision alleging the claimant failed to establish that he suffered an accidental injury arising out of and in the course of his employment. Respondent maintains claimant's present need for medical treatment is not due to any work-related injury on June 11, 2009, but rather causally related to an accident he sustained over the Memorial Day holiday weekend in May 2009 based on the testimony of Dr. Fevurly and Dr. Stull. For this reason, respondent maintains the ALJ's Order should be reversed.

Claimant argues that while the May 2009 accident caused injury to his shoulder, the June 11, 2009 accident was significant and caused further injury, necessitating the present

need for medical treatment. Accordingly, claimant maintains the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

There is no dispute that claimant sustained an injury to his shoulder over the Memorial Day weekend in May 2009. He was standing on a ladder when the ladder unexpectedly split, causing claimant to reach out with his hand in order to avoid falling to the ground. Claimant hung from a deer feeder for a period of time and sustained an injury to his right shoulder. Claimant was given topical pain medication for his injury, and was directed to stay off work for 2 weeks.

Claimant was required to see the company doctor on June 10, 2009 before he could return to work. According to those records, claimant was found to have full range of motion in his shoulder, no tenderness to the subacromial joint and only very minimal tenderness to the bicipital groove region. The conclusion of that examination was that the right shoulder strain had resolved.

Claimant worked a full shift on June 10, 2009. He returned to work on June 11, 2009, again working a full shift at his normal duties. Claimant was called back in for overtime and was engaged in a project which required him to tighten a bolt on a reactor. As he was tightening the bolt, using "extreme force"<sup>1</sup> he felt a pop. He immediately experienced what he described as extreme pain and dropped to his knees.<sup>2</sup> He left the area, holding his shoulder.

Claimant informed respondent of the accident and was referred back to the Business Health Center Facility where he was seen on June 10, 2009. Diagnostic tests were performed, including an MRI. Unfortunately, claimant was unable to complete the MRI due to shoulder pain. He was referred back to the Business Health Center to obtain more pain medication so that he could complete the MRI.<sup>3</sup> The MRI was eventually completed and a rotator cuff tear was identified.

Claimant was eventually seen by Dr. Chris Fevurly who recommended surgery for the shoulder condition. However, Dr. Fevurly opined that claimant's rotator cuff tear was not work-related. Claimant thereafter sought out treatment with Dr. Douglass Stull who

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<sup>1</sup> P.H. Trans. at 13.

<sup>2</sup> *Id.* at 11-12.

<sup>3</sup> *Id.* at 15-16.

ultimately performed the surgical repair. When asked to speak to the source of claimant's rotator cuff tear, Dr. Stull offered the following:

...[claimant] fell from a ladder on Memorial Day weekend sustaining an injury to his shoulder. At that time he had significant problems with his shoulder but was able to continue working. He did continue working and in early June he was pulling a wrench while at work when he felt a sharp pain in his arm and shoulder. He was treated conservatively for a period of time but his pain persisted and an MRI was obtained which did reveal a full thickness rotator cuff tear. This rotator cuff tear ultimately underwent operative intervention in the form of an open rotator cuff repair which involved the supraspinatus and subscapularis tendons. **It is my opinion that this rotator cuff tear occurred in two separate events as described above. I believe the supraspinatus tendon was his first injury and the subscapularis tendon tear happened while he was pulling the wrench while at work.**<sup>4</sup>

After considering the evidence presented by the parties, the ALJ concluded that claimant has met his burden of establishing that an accidental injury occurred on June 11, 2009 and that the injury arose out of and in the course of his employment.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.<sup>5</sup>

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>6</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>7</sup>

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<sup>4</sup> *Id.*, Cl. Ex. 1 at 3 (Letter from Dr. Stull dated September 1, 2009). Emphasis added.

<sup>5</sup> *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

<sup>6</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>7</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.<sup>8</sup>

In this instance, the question is not whether claimant sustained an accident over Memorial Day weekend or on June 11, 2009 as it appears there’s no dispute as to the existence of either event. Rather, the determinative issue is whether claimant’s need for treatment is due to the injury on June 11, 2009 while in respondent’s employ. And on this point, the ALJ was persuaded that claimant had met his burden of proof. While claimant admittedly had some injury to that same shoulder weeks before the June 11, 2009 accidental injury, that fact alone does not negate the compensability of the work-related injury. Dr. Stull has indicated that claimant’s rotator cuff tear occurred in two separate events, with the subscapularis tendon tear occurring on June 11, 2009. Although Dr. Fevurly has suggested that claimant’s shoulder injury is solely attributable to the Memorial Day weekend accident, the ALJ was not persuaded. Based on this evidence developed in this record, this Board Member finds the ALJ’s Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>9</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated September 28, 2009, is affirmed.

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<sup>8</sup> *Id.*

<sup>9</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2009.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant  
Meredith L. Moser, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge